No. 96-110



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,
Attorney General of Washington,

*Petitioners*,

—v.—

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D.,
THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., PH.D.,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF THE CENTER FOR REPRODUCTIVE LAW & POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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This *amicus curiae* brief is submitted in support of Respondents Glucksberg, *et al.* By letters filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief.

## INTEREST OF AMICUS CURIAE

The Center for Reproductive Law and Policy (CRLP), founded in 1992, is an independent, non-profit legal organization dedicated to ensuring that all women have access to safe and affordable reproductive health care. Through litigation, research, policy analysis and public education, CRLP protects the right and ability of women around the world to obtain the full range of reproductive health services including abortion, contraception and new reproductive technologies. During the past twenty years, CRLP attorneys have been counsel for the parties or *amici curiae* in nearly every Supreme Court case concerning reproductive liberty, including *Whalen v. Roe*, 429 U.S. 589 (1977), *Carey v. Population Services International*, 431 U.S. 678 (1977), *Colautti v. Franklin*, 439 U.S. 379 (1979), *Bellotti v. Baird*, 443 U.S. 622 (1979), *Harris v. McRae*, 448 U.S. 297 (1980), *H.L. v. Matheson*, 450 U.S. 398 (1981), *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), *Bowen v. Kendrick*, 487 U.S. 589 (1988), *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Because the court of appeals relied heavily on this Court's reproductive rights jurisprudence in invalidating Washington's assisted suicide statute as applied, *amicus* has a vital interest in the outcome of this case.

## SUMMARY OF ARGUMENT

In holding that Washington's ban on assisted suicide as applied to terminally ill patients seeking medication to hasten death violates the Due Process Clause of the Fourteenth Amendment, the court of appeals relied heavily on this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), finding a terminally ill person's decision to seek medication to hasten death very similar to the abortion right reaffirmed in *Casey*. *See Compassion in Dying v. Washington*, 79 F.3d 790, 813-14 (9th Cir. 1996) (en banc). While emphasizing the similarities between the two decisions, the court of appeals failed to recognize that there are also important differences that dictate the use of different standards of review, without affecting the outcome of the constitutional tests.

Both a woman's decision to choose abortion as well as a terminally ill person's decision to seek medication to hasten death are deeply personal, weighty choices concerning an individual's bodily integrity and autonomy, and therefore, receive protection under this Court's precedents. However, unlike the freedom at issue here, the decision to choose abortion also has deep connections to a woman's ability to shape her family life and her role in American society, enabling her to break free of stereotypes that deny her the "equal opportunity to aspire, achieve, participate in, and contribute to society based on [her] individual talents and capacities." *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996).

Although ignored by the court of appeals, the differences, coupled with a history of discrimination against women, justify a different standard of review, but do not support a different result. Indeed, this Court need not even



consider its abortion cases in deciding this case. Because the Washington statutes cannot be constitutionally applied to respondents under this Court's bodily integrity and autonomy precedents, including this Court's only decision concerning an individual's constitutionally protected freedom to hasten death, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the judgment of the court of appeals must be affirmed.

This Court's recognition in *Cruzan* that an individual has a protected liberty interest in hastening death by terminating life-sustaining treatment also applies when a terminally ill patient is seeking medication to hasten death. The Constitution's protection of bodily integrity and autonomy does not only apply to the refusal of unwanted treatment. It also encompasses a patient's freedom to make decisions concerning one's body and one's course of medical treatment.

Under *Cruzan*'s balancing analysis, neither of the asserted state interests justifies Washington's absolute prohibition. Where, as here, a terminally ill patient decides to end his or her life in an effort to avoid intense pain and anguish, the state interest in protection of life must give way to that individual's bodily integrity and autonomy. Indeed, Washington recognizes, in the context of termination of life-sustaining treatment, that the interest in preserving life does not outweigh the individual's freedom to make decisions about his life and course of medical treatment.

Likewise, the State's legitimate interest in avoiding mistake and abuse does not support Washington's absolute prohibition. Identical pressures are at work where a patient seeks a physician's assistance in terminating life-sustaining treatment as are present when taking medication to hasten

death. Because Washington has decided that its legitimate interests do not support a prohibition on an individual's decision to terminate treatment necessary for life, the State's claim that regulatory measures will not safeguard against mistake and abuse is wholly unreasonable and fails to justify the flat ban at issue here.

## ARGUMENT

### I. THE DIFFERENCES BETWEEN THE LIBERTY INTEREST HERE AND *PLANNED PARENTHOOD V. CASEY* JUSTIFY DIFFERENT STANDARDS OF REVIEW, BUT DO NOT SUPPORT REVERSAL.

#### A. The Ninth Circuit Properly Recognized the Similarities Between the Liberty Interest Here and the Right to Choose Abortion, But Ignored The Important Differences.

Constitutional protection for a woman's decision to choose abortion and for a terminally ill patient's decision to hasten death -- either by seeking medication or terminating life-sustaining treatment -- finds support in this Court's decisions affording protection to personal autonomy and bodily integrity. Over a century ago, this Court recognized the fundamental importance of an individual's control over decisions concerning his or her body. As this Court explained, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ." *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

Since *Botsford*, a long and unbroken line of this Court's cases have afforded constitutional protection to an



individual's "most basic decisions about . . . bodily integrity." *Casey*, 505 U.S. at 849. *See, e.g., Riggins v. Nevada*, 504 U.S. 127 (1992) (overturning criminal conviction because defendant was forced to take antipsychotic drugs during the course of trial); *Cruzan*, 497 U.S. 261 (recognizing constitutional protection for an individual's decision to hasten death by terminating life-sustaining treatment); *Winston v. Lee*, 470 U.S. 753 (1985) (invalidating surgical removal of a bullet from a robbery suspect); *Rochin v. California*, 342 U.S. 165 (1952) (invalidating stomach pumping of criminal suspect in search for drugs). Contrary to the State's argument, these decisions not only protect the individual against forced bodily invasion by the government; they also protect an individual's freedom to make decisions concerning his or her body, including the decision affirmatively to seek desired medical treatment.

In *Casey*, this Court recognized that a woman's right to choose whether to obtain an abortion or carry her pregnancy to full term flows, in part, from these established constitutional principles of bodily integrity and autonomy. *See Casey*, 505 U.S. at 857 (noting that constitutional protection for the abortion decision is a "rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on the power to mandate medical treatment or to bar its rejection"); *id.* at 927 (Blackmun, J., concurring in part and dissenting in part) ("compelled continuation of pregnancy infringes on a woman's right to bodily integrity"). Likewise, in *Cruzan*, eight members of this Court affirmed that the constitutional protections of bodily integrity and autonomy applied to an individual's decision to hasten death by terminating life-sustaining treatment. *See Cruzan*, 497 U.S. at 278-79; *id.* at 287-89 (O'Connor, J., concurring); *id.* at 304-12 (Brennan, J., dissenting); *id.* at 331, 339-43 (Stevens, J.,

dissenting). The same is true here. *See infra* § I.B.

But unlike the freedom in *Cruzan*, the right to choose abortion does not solely rest on bodily integrity and autonomy. The Constitution also protects the right to choose abortion because it is a part of the "private realm of family life that the state may not enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Noting that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education," *Casey*, 505 U.S. at 851, this Court in *Casey* explained that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.*

In finding that the Constitution's protection of personal privacy included the right to choose abortion, the Court emphasized two points. First, this Court recognized that the decision to choose abortion "is of the same character as the decision to use contraception," and the Constitution protects both choices "because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Id.* at 852, 853. Second, the Court stressed that women need to be free to choose abortion in order to shape their destiny and role in American society. As the *Casey* majority explained:

> [T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by a woman with a pride that ennobles her



> in the eyes of others and gives the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

*Id.* at 852; *see also id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation have been facilitated by their ability to control their reproductive lives.").

These differences justify the stronger, more protective standard of review applicable in abortion cases, and distinguish the *Casey* standard from the balancing analysis applied by this Court in *Cruzan*. In *Casey*, recognizing that state regulation of the abortion choice is "doubly deserving of scrutiny," *id.* at 896, as it "touche[s] not only upon the private sphere of the family, but upon the very bodily integrity of the pregnant woman," *id.*, the joint opinion fashioned the two-pronged undue burden test to determine the validity of state statutes restricting a woman's right to choose abortion before viability.

Although different from the traditional form of strict scrutiny, the undue burden test requires courts to engage in heightened scrutiny of state abortion regulations, mandating a searching inquiry into both the purpose and effect of state abortion regulations. As the joint opinion explained, under the undue burden test, a statute is an unconstitutional limitation on a woman's right to choose abortion if it has

> the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

*Id.* at 877.

The two prongs of the undue burden test function together to ensure that the state does not impose unnecessary and arbitrary obstacles to a woman's decision to choose abortion before viability. Under the "effect" prong, an abortion regulation that imposes a substantial obstacle in the path of a woman's decision to choose abortion is invalid. Under this standard, a state's prohibition of abortion is, of course, unconstitutional. *Id.* at 846, 879. But the "effects" prong of the undue burden test also bars states from passing restrictive regulatory measures. State regulations that deter women from seeking abortions through burdensome restrictions on the right to choose abortion are unconstitutional. *See id.* at 893-94 (finding that husband-notification provision imposes an undue burden because it is "likely to prevent a significant number of women from obtaining an abortion. . . . We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.").



The *Casey* undue burden standard, however, does not limit the Constitution's protections to those laws that have the effect of imposing a substantial obstacle on a woman's right to choose abortion. Because of the higher threshold necessary to establish that an abortion regulation has the effect of imposing an undue burden on a woman's right to choose abortion,[1] the *Casey* joint opinion establishes a second limitation on state power to restrict abortion, recognizing that the "effect" test alone would not adequately protect the woman's right to choose. The "purpose" prong seeks to ensure that state regulation of abortion furthers legitimate state objectives -- such as enhancing and informing a woman's abortion decision -- not the impermissible end of hindering her choice. Even where it imposes no substantial obstacle on a woman's decision to terminate her pregnancy, a state regulation enacted with the illegitimate purpose of making abortions more difficult to obtain are invalid. *See Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir. 1996) (noting that "one proper inquiry" under *Casey*'s purpose prong "is whether 'the requirements serve no purpose other than to make abortions more difficult'") (quoting *Casey*, 505 U.S. at 901); *cf. Planned Parenthood v. Danforth*, 428 U.S. 52, 79 (1976) (invalidating ban on saline abortions as "an unreasonable or

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[1] By contrast, before *Casey*, any statute that imposed a non-de minimis burden on the right to choose abortion triggered strict scrutiny, requiring the state to prove that an abortion restriction was narrowly tailored to achieve a compelling state interest. *See id.* at 871; *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983); *Roe v. Wade*, 410 U.S. 113, 155 (1973). In adopting the undue burden test, the joint opinion noted that "[t]he very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. . . . [T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Casey*, 505 U.S. at 876.

arbitrary regulation designed to inhibit . . . the vast majority of abortions after the first 12 weeks").

As in other areas of this Court's jurisprudence, determining whether an unconstitutional purpose is "the predominant factor motivating the legislature's decision," *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995), requires a searching and rigorous inquiry into the totality of circumstances surrounding the legislative enactment. *See, e.g.*, *Bush v. Vera*, 116 S. Ct. 1941, 1951-1960 (1996) (plurality opinion); *Shaw v. Hunt*, 116 S. Ct. 1894, 1900-01 (1996); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2227-2231 (1993); *Edwards v. Aguillard*, 482 U.S. 578, 586-89 (1987). As in these other areas, a long history of persistent state hostility to the abortion right justifies this rigorous examination of the purpose of state abortion laws.

This searching standard of review is necessary because only women bear the burdens of restrictive abortion laws. As this Court recognized in *Casey*, restrictive abortion laws deprive women alone of the freedom to make the deeply personal and private decision to choose to terminate a pregnancy, instead forcing them to undergo the serious bodily intrusions associated with childbirth. *See Casey*, 505 U.S. at 850-53, 857-59. *Casey* demands an especially careful review to ensure that these laws do not impose on women -- as they have throughout history -- the state's "own vision of [her] role," preventing her from shaping her "destiny . . . and her place in society." *Id.* at 852. This need to carefully scrutinize laws that single out women for burdens resonates with this Court's equal protection jurisprudence, *see Virginia*, 116 S. Ct. at 2274 ("skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history"); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1433 (1994)



(Kennedy, J., concurring) (noting "strong presumption that gender classifications are invalid"), and reflects the need to overcome the continuing effects of our Nation's "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).[2]

Indeed, this Court in *Casey* invalidated the husband-notification provision precisely because it was predicated upon stereotypical assumptions about the wife's role as mother and homemaker, ratified in cases such as *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), and *Hoyt v. Florida*, 368 U.S. 57 (1962), and the husband's role as head and master of the family. *See Casey*, 505 U.S. at 896-97. This Court recognized that by giving husbands a way to compel their wives to bear children for them, the state had sought to embody into law "the common-law status of married women [that is] repugnant to our present understanding of marriage and of the nature of rights secured by the Constitution." *Casey*, 505 U.S. at 898. "A State may not give to a man that kind of dominion over his wife that parents exercise over their children." *Id.*

Because the strength of the state interests change over the course of a woman's pregnancy, *Casey*'s undue burden

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[2] As Justice Ginsburg noted only last Term:

> Through a century plus three decades and more of [our] history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine, that government . . . could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for this discrimination.

*Virginia*, 116 S. Ct. at 2275 (citations omitted).

test does not govern all challenges to statutes restricting abortion. Where the state restricts a woman's freedom to choose abortion after viability, the basic principles in place since *Roe v. Wade*, 410 U.S. 113 (1973), remain applicable. Although a state maintains some latitude to ban abortions after a physician determines that the fetus is viable, the state's interest in the protection of viable fetal life can never override a woman's substantial liberty interest in making medical choices about her life and health. *See Casey*, 505 U.S. at 879; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986) (invalidating post-viability choice of method regulation because it failed to "require that maternal health be the physician's paramount consideration"); *Roe*, 410 U.S. at 164-65 (noting that state may not prohibit abortions after viability where "necessary . . . for the preservation of the life or health of the mother"); *Jane L. v. Bangerter*, 61 F.3d 1493, 1504 (10th Cir. 1995) (noting that "[t]he importance of maternal health is a unifying thread that runs from *Roe* to *Thornburgh* and then to *Casey*"), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam).

In these circumstances, the woman's interest in making choices about her life and health trumps any state interest in preserving the potential life of a viable fetus. The State is not even permitted to balance the harms to a sick woman against the interest in the life of the viable fetus. Instead, the decision "must be left to the discretion of the individuals involved. Neither the legislature, nor the courts, has either the legal or the moral authority to balance the interests and the lives involved, and to make this decision." *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051, 1060 (S.D. Ohio 1995), *appeal docketed*, Nos. 96-3157, 96-3159 (6th Cir. Feb. 8, 1996); *see also In re A.C*, 573 A.2d 1235, 1237 (D.C. 1990) (en banc)



(overturning order requiring dying pregnant woman to undergo caesarean section delivery in an attempt to save fetus because "in virtually all cases the question of what is to be done is to be decided by the patient -- the pregnant woman -- on behalf of herself and the fetus"); *In re Baby Boy Doe*, 632 N.E.2d 326, 330 (Ill. Ct. App. 1994) (holding that "a woman's competent choice in refusing medical treatment as invasive as a cesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to her [viable] fetus").

### B. These Differences Do Not Support Reversal, Because Under *Cruzan*, A Terminally Ill Person Has A Substantial Constitutionally Protected Interest In Obtaining Medication To Hasten Death.

While a terminally ill person's deeply personal decision to hasten death differs, in certain respects, from the right to choose abortion or carry a pregnancy to full term, these differences do not support a different result, because the absolute prohibition at issue here is unconstitutional as applied under the standard set forth in *Cruzan*.[3] In *Cruzan*, this Court considered whether Nancy Cruzan, who was incompetent and in a persistent vegetative state following a car accident, had a liberty interest in refusing treatment that was necessary to keep her alive. In reaching its conclusion that Ms. Cruzan enjoyed a protected interest, this Court engaged in a narrow and focused contextual

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[3] Throughout this litigation, petitioners have urged the courts to apply the standard for a facial challenge set forth in *United States v. Salerno*, 481 U.S. 739 (1987). Petitioners have now wisely abandoned that position. Because the court of appeals invalidated the statute as applied, not on its face, *Salerno*, by its terms, has no application here.

analysis, noting that "in deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.'" *Cruzan*, 497 U.S. at 277-78 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)).

As in *Cruzan*, this Court "must begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The issue here is not, as a general matter, whether "there is a liberty interest protected by the Fourteenth Amendment in committing suicide that includes assistance in doing so," Wash. Br. at 21, but a much narrower question -- whether the assisted suicide statute is unconstitutional as applied to terminally ill patients who seek the aid of a physician in obtaining medication to hasten their own death.[4]

In *Cruzan*, this Court recognized that the Due Process Clause of the Fourteenth Amendment protects an individual's decision to hasten his or her death by withdrawing life-sustaining treatment. Surveying both the common law[5] and this Court's decisions defining the

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[4] Fundamental principles of judicial restraint counsel against resolving the constitutionality of other applications of these statutes, especially in the absence of full briefing on these issues. *See Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (noting that the "Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'") (quoting *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

[5] Although this Court in *Cruzan* began its opinion with a lengthy discussion of the common law's protection of bodily integrity, this Court's opinion did not merely constitutionalize the common law right.

(continued...)



substantive reach of the Due Process Clause, Chief Justice Rehnquist's opinion for the Court found that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Id.* at 278. Furthermore, the Court explained that the "logic" of its cases defining the scope of liberty under the Due Process Clause "would embrace . . . a liberty interest" to decline "artificially delivered food and water essential to life." *Id.* at 279; *id.* at 281 ("the Due Process Clause protects . . . an interest in refusing life-sustaining treatment").

Because Missouri did not seek to deprive her of the ability to end her life by withdrawing life-sustaining treatment, but merely required that Ms. Cruzan -- like all other incompetent patients -- offer clear and convincing evidence that she wanted to withdraw life support, the lead opinion spent little time analyzing the contours of Nancy Cruzan's liberty interest. Nevertheless, the separate opinions of the Justices extensively considered whether Nancy Cruzan had a protected liberty interest. These opinions guide the analysis here.

Justice O'Connor joined with the four dissenting Justices in finding that the Constitution protects an individual's decision to hasten death by withdrawing life-sustaining treatment.[6] Noting that "our notions of liberty

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[5] (...continued)
Instead, the Court sharply distinguished the common law precedents, noting that state courts have a number of sources of law "not available to us." *Id.* at 277. After examining its own precedents, the Court then determined that the Constitution protects an individual's decision to decline life-sustaining treatment. *Id.* at 278-79.

[6] Justice Scalia also filed a concurring opinion. Disagreeing with the majority opinion as well as the separate opinions of Justice O'Connor

(continued...)

are inextricably intertwined with our idea of physical freedom and self-determination," Justice O'Connor found that the State's imposition of life-sustaining medical treatment on an unwilling competent adult impinged on an individual's constitutionally protected liberty interests. *Id.* at 287 (O'Connor, J., concurring). As she explained, "[a] seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining treatment or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion." *Id.* at 288 (O'Connor, J., concurring).

As Justice O'Connor noted, forcing an individual to remain on life-sustaining treatment is a significant deprivation of liberty for two reasons. First, the Constitution protects bodily integrity. *Id.* at 287 (O'Connor, J., concurring) ("the Court has deemed state incursions into the body repugnant to the interests protected by the Due Process Clause"). Second, mandating medical treatment deprives a patient of her decisional autonomy concerning her body. *Id.* at 289 (O'Connor, J., concurring) ("Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment.").

Moreover, this deprivation of liberty is especially severe where an individual's decision to refuse treatment will hasten his or her death. These private and intimate

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[6] (...continued)
and the four dissenting Justices, he argued that the refusal of life-sustaining treatment was a form of suicide, and, like all forms of suicide, received no constitutional protection. *Id.* at 292-301 (Scalia, J., concurring).



decisions lie at the core of the liberty protected by the Due Process Clause. As Justice O'Connor explained, "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." *Id.*

Like Justice O'Connor, Justice Brennan and Justice Stevens, in dissent, emphasized that forcing an individual in a persistent vegetative state to use life-sustaining treatment intrudes on his or her bodily integrity and strikes at the core of the personal autonomy over intimate and private matters protected by the Due Process Clause. As Justice Brennan explained, the Constitution protects an individual's decision to hasten his or her death by refusing life-sustaining treatment because "[d]ying is personal. And it is profound. For many the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence." *Id.* at 310-11 (Brennan, J., dissenting).

Justice Stevens sounded this same theme in his separate dissent:

> Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our mortality are undoubtedly "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator.
>
> The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from

> faith, and that is reason alone to protect the freedom to conform choices about death to individual conscience.

*Id.* at 343 (Stevens, J., dissenting) (citations omitted) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Consistent with *Cruzan*, other decisions of this Court recognize that the Constitution provides heightened protection to dying persons. For example, in *Roe*, even the dissenters recognized that a state could not prohibit abortions in all cases; at the very least, a state could not prohibit a woman from obtaining an abortion where continued pregnancy would endanger her life. *See Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting). Thus, then-Justice Rehnquist recognized that a dying woman is entitled to stronger constitutional protection than all other women. The choice, however, remains the woman's to make. The State cannot force her to obtain an abortion even where continued pregnancy will lead to her death.

In an effort to distinguish the protections *Cruzan* affords to individuals to hasten their death, the State of Washington argues that its absolute prohibition does not implicate a protected liberty interest because it does not compel anyone to use life-sustaining treatment, but rather, prohibits terminally ill persons from choosing to take medication to hasten death. *See* Wash. Br. at 28-30.

But it is well-established that the Constitution's protections of the body are not limited to halting governmental intrusions into the body. The Constitution also guarantees decisional autonomy concerning one's body, affording individuals both the right to seek and the right to decline medical treatment. Indeed, this Court's cases



concerning the Constitution's protection of bodily integrity have long recognized a close connection between bodily integrity and personal autonomy. The Constitution protects against governmental intrusion into one's body in order to protect the individual's freedom to make decisions concerning her body. As Justice O'Connor explained in *Cruzan*, this Court has deemed "state incursions into the body repugnant to the interests protected by the Due Process Clause," precisely because "our notions of liberty are inextricably intertwined with our idea of physical freedom and self-determination." *Cruzan*, 497 U.S. at 287 (O'Connor, J., concurring).

Individual self-determination over one's body is not limited to the freedom to reject medical treatment. Bodily integrity and autonomy, if it is to mean anything, must include a patient's freedom to choose a course of medical treatment. After all, "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his person, free from all restraint and interference from others . . . ." *Botsford*, 141 U.S. at 251.

Similarly, by prohibiting terminally ill patients from making the deeply personal decision to take medication to hasten death, the Washington statute at issue here deprives these patients of the ability to exercise control over the manner of their death, their bodies, and "the course of [their] own medical treatment," *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring), often forcing them to endure anguish and pain until they die. Indeed, for terminally ill patients, the prospect of death defines their existence and circumscribes the exercise of their life choices. Because much of their lives have become focused on preparation for death, the decision about whether to hasten death is often one of the few defining decisions that terminally ill persons may make concerning their lives.

Furthermore, Washington's absolute prohibition on medical assistance to hasten death leaves terminally ill patients with only two choices: to remain on treatment regimes, which often require them to endure intense anguish and pain, and prolong their life, or to refuse treatment, thereby causing them even more severe pain. To many this dilemma leaves terminally ill patients feeling "captive of the machinery" required for their treatment, "burdening [their] . . . liberty interests as much as any direct state coercion." *Id.* at 288 (O'Connor, J., concurring); *see also Washington v. Harper*, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); *Winston*, 470 U.S. at 766 (finding that "the intrusion on [suspect's] privacy interests entailed by the [surgical operation to remove evidence from his body] can only be characterized as severe"); *Rochin*, 342 U.S. at 174 (finding that forcible stomach pumping was "so brutal and so offensive to human dignity" as to violate due process). By forcing plaintiffs to undergo these state-mandated harms when their physicians could provide medication to relieve their pain, once and for all, the statutes here deprive them of a substantial liberty interest.

Washington also argues that the Constitution affords no protection to the decision to seek medication to hasten death because of the long history of state statutes banning assisted suicide. Wash. Br. at 21-25. But this Court has long rejected the view that the Due Process Clause protects only those practices historically permitted by the states. The right to use contraceptives, the right to choose abortion, the right to marry a person of another race, and the right to be free of state-mandated segregated schooling are among the rights protected by the Due Process Clause despite a long history of statutes denying these rights. *See Roe*; *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Bolling v. Sharpe*, 347 U.S. 497 (1954).



As this Court explained nearly thirty years ago, "we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966). "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Constitution's protections "may not be submitted to a vote; they depend on the outcome of no elections." *Id.* at 638.

Moreover, as this Court has often recognized, relying exclusively on what the states have legislated in determining the scope of the Constitution's protections would imperil numerous constitutional freedoms recognized by this Court's decisions. *See Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 116 S. Ct. 2342, 2350 (1996) (refusing to carve out "a special exception to our unconstitutional conditions precedents" based on "'long and unbroken tradition'" of patronage contracting); *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (noting that if early American history were "determinative . . . evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship"). As these cases demonstrate, there are sound reasons for this refusal to place reliance on historical practice in determining the scope of the liberty protected by the Due Process Clause. "A prime part of the history of our Constitution . . . is the

story of the extension of constitutional rights and protections to people once ignored and excluded." *Virginia*, 116 S. Ct. at 2287.[7]

## II. THE STATE INTERESTS DO NOT JUSTIFY WASHINGTON'S ABSOLUTE PROHIBITIONS UNDER *CRUZAN*'S BALANCING ANALYSIS.

In *Cruzan*, this Court applied a balancing test to determine whether Missouri could require a showing of clear and convincing evidence before permitting an incompetent patient to terminate life-sustaining treatment. As Chief Justice Rehnquist announced in *Cruzan*, "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" *Cruzan*, 497 U.S. at 279 (footnote omitted) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

Unlike the undue burden standard used in *Casey* to evaluate restrictions on pre-viability abortions and the more traditional strict scrutiny standard, *Cruzan*'s balancing test is a more flexible standard. A reviewing court must weigh both the nature and character of the liberty deprivation and

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[7] Furthermore, the relationship between terminally ill persons and the state has changed significantly since the initial passage of the assisted suicide statutes in the 19th century. Because of advances in medicine, terminally ill persons can now survive, and in some circumstances endure pain, far longer than in the past, raising bio-ethical issues uncommon in earlier times. *Cf. Brown v. Board of Educ.*, 347 U.S. 483, 492-493 (1954) ("[W]e cannot turn the clock back to 1868 . . . . We must consider public education in light of its full development and its present place in American life throughout the Nation.").



the asserted state interests in determining the validity of the state's regulation. *See Cruzan*, 497 U.S. at 279-287. The rigor of the Court's review of the state interests depends on the burden imposed by the statute. Where the individual's liberty interest is substantial, the state must come forward with a correspondingly substantial justification, requiring the court to consider the possibility of less intrusive alternatives. *See Riggins*, 504 U.S. at 134-35 (because forced injection of antipsychotic drugs is a substantial interference with a convicted prisoner's liberty interests, a state must show "overriding justification" to support forcible medication, including consideration of less intrusive alternatives).

There can be no question that the statutory prohibitions here deprive terminally ill persons of a substantial liberty interest. These statutes bar, without exception, all terminally ill persons from seeking medication to hasten death, preventing them from making the deeply personal decision to hasten death, and depriving them of the power to exercise control over their bodies in an effort to avoid the intense and brutal pain caused by their illness. *See supra* § I.B.

In its brief to this Court, Washington offers two rationales for its total prohibition on this substantial liberty interest: the protection of human life and the protection of vulnerable patients from mistake and abuse. *See* Wash. Br. at 33-38. Neither of these important interests, however, supports the complete prohibition at issue here. Moreover, these interests do not explain or justify the lines drawn by the Washington legislature.

In *Cruzan*, this Court considered whether a state could require a showing, by clear and convincing evidence, that an incompetent patient desired to withdraw life-sustaining

treatment before terminating such treatment. In considering that regulatory measure, the Court found that the state's interest in protecting human life outweighed Nancy Cruzan's constitutionally protected liberty interest in terminating her life by ending life-sustaining treatment without meeting the requisite burden of proof. *Cruzan*, 497 U.S. at 280-87. Here, however, the question is not whether the state can require proof that the patient, as opposed to some third party, desires to hasten death, but whether the state can override the clearly expressed wishes of a terminally ill patient who is suffering unendurable pain in the last days of life. The answer must be no.

This Court's precedents concerning "personal autonomy and bodily integrity" have long recognized that a "State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 857 (citing, *inter alia, Cruzan*). This must certainly be the case where, as here, the state seeks to further this interest by preventing terminally ill patients from ending their life in dignity, in their own way and on their own terms. Ever since the New Jersey Supreme Court's landmark decision in *In re Quinlan*, 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976), courts have refused to force terminally ill patients "to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive and sapient life." *Id.* at 663. Instead, as in *Quinlan*, the state's interest in preserving life "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims." *Id.* at 664. Where, as here, the life of a terminally ill person is nearing its end and that person is suffering from intense pain, that individual's substantial liberty interest in bodily



integrity surely must "overcome the State interest." *Id.*[8]

Moreover, Washington itself recognizes, in the context of a patient's request to terminate life-sustaining treatment, that the interest in preserving life must give way to the individual's right to control his body and die with dignity. By court decision and statute, Washington law permits a terminally ill patient to hasten death by refusing life-sustaining treatment or by directing physicians to remove such treatment. *See Compassion in Dying*, 79 F.3d at 817-18 (reviewing legislative enactments and caselaw). These statutes and court decisions, which recognize that the state's interest in the preservation of life cannot justify overriding the wishes of a terminally ill person who seeks to hasten his

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[8] Despite the differences in the right at stake and the state interests, this Court has struck a similar balance in its decisions from *Roe* to *Casey*, finding that the state's interest in the potential life of a viable fetus cannot outweigh a woman's decisions concerning her life or health. *See supra* at 12-13. Rather than permitting the state to override a woman's decisional autonomy in these matters, the Constitution makes the woman the final arbiter of her fate, free to choose life or death consistent with her own moral code and religious beliefs. *Cf. Baby Boy Doe*, 632 N.E.2d at 332 ("[A] woman's right to refuse invasive treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy. The woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant."). Ceding to the state the central authority to weigh these deeply personal matters not only violates the principles of self-determination and autonomy that generally govern health care decision-making, but strikes at the heart of the freedom of conscience and religious belief. If the state's interest in life justified overriding the woman's choice, a state could force a terminally ill pregnant woman to obtain an abortion to save her life, even when she chooses for religious reasons to sacrifice herself to the developing life within her. This recognition of bodily integrity and autonomy, even where the state interest is strong, is instructive where, as here, terminally ill patients are making equally momentous medical decisions concerning their lives.

death by terminating life-sustaining treatment, powerfully undermine Washington's claim that a total prohibition is necessary to further its legitimate interest in preserving life. *See City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994) (noting that exemptions from ban on homeowners displaying signs on their property "diminish[es] the credibility for [speech prohibition] in the first place" because they show that the city has "determined that some of the[] [signs] are too vital to be banned"). State regulatory efforts, like those upheld by this Court in *Cruzan*, can strike the proper balance between the individual's freedom to control his or her body and die in a dignified manner and the state interest in preserving life. Here too, Washington's statutes and cases recognize that, for terminally ill patients, decisions concerning whether to die with dignity are "too vital to be banned." *Gilleo*, 114 S. Ct. at 2044.

In an effort to distinguish this body of law, Washington and their *amici* argue that there are differences between terminating life-sustaining treatment and prescribing medication: in one instance, the physician lets the patient die; in the other, the medication causes the patient's death. Wash. Br. at 37-38; U.S Br. at 28 (No. 96-110). This is a distinction, but not a relevant one for constitutional line-drawing. It does not explain why the state's interest in preserving life must give way to the right of a terminally ill patient to hasten death by terminating or refusing life-sustaining treatment, but not the right of a terminally ill person to seek medication to hasten death. In both instances, the patient's decision inevitably results in death. If the state's interest in life does not support a complete ban on terminating life-sustaining treatment, it is difficult to understand why that same interest supports the ban here simply because death occurs in a different manner.



A similar analysis applies to the state interest in avoiding mistake and abuse. There can be no doubt that this is a legitimate interest and would support state regulation concerning the procedures required before a physician could prescribe medication to hasten death. But it cannot support the total prohibition at issue here any more than can the state's interest in preserving life.

Termination of life-sustaining treatment raises exactly the same problems concerning mistake and abuse as the prescription of medication to hasten death. In both cases, doctors may abuse their authority and pressure terminally ill persons to hasten their deaths. Washington has not explained why the pressures exerted by physicians in this context -- both subtle and otherwise -- are any different when a physician withdraws a patient's life-sustaining treatment. In the face of this silence, the untested assumption that procedural safeguards would be unworkable is wholly unreasonable and cannot justify the absolute prohibition here.

The United States, in an effort to distinguish the two practices, argues that a patient's choice to hasten death often reflects inadequate treatment for the patient's pain, not a true desire to hasten death. The total ban, they argue, should be upheld because of a "very significant risk that persons with treatable depression and pain will be allowed to commit suicide." U.S. Br. at 23 (No. 96-110). Even if this is an "overriding interest," *id.*, far less intrusive measures could allay this concern without the need for the flat prohibition imposed by the state. Before permitting physicians to prescribe medication to hasten death, states have broad discretion to enact measures to ensure that a patient's decision is truly voluntary, and not the result of inadequate pain management. The State has failed to explain why these less intrusive measures would not

adequately serve this interest. *Cf. Riggins*, 504 U.S. at 135-36. Indeed, the protocols used by Compassion in Dying illustrate some of the procedural safeguards available to ensure voluntariness. *See Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1458 (W.D. Wash. 1994).[9]

In view of the plaintiffs' strong liberty interest and the state's inability to convincingly explain why a prohibition is necessary here, but not in the context of the termination of life-sustaining treatment, these statutes must be declared unconstitutional as applied to plaintiffs.

## CONCLUSION

For all the foregoing reasons, *amicus* respectfully urge this Court to affirm the decision of the court of appeals.

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[9] The same is true of the argument that physicians will misdiagnose some patients as terminally ill. A prohibition is a patently overbroad and unreasonable approach to this concern. Regulatory measures, such as a statutory definition of terminal illness, are more than sufficient to serve this interest.